FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [illegible]

NO. 29

JAMES B. GULLY, STATE TAX COLLECTOR
FOR STATE OF MISSISSIPPI ——— PETITIONER

vs.

FIRST NATIONAL BANK IN MERIDIAN
RESPONDENT

ORIGINAL BRIEF FOR RESPONDENT

A. S. BOZEMAN
R. P. WILBOURN
Attorneys for Respondent

BOZEMAN, CAMERON & BOZEMAN,
Meridian, Mississippi
WILBOURN, MILLER & WILBOURN,
Meridian, Mississippi

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

NO. 29

JAMES B. GULLY, STATE TAX COLLECTOR FOR STATE OF MISSISSIPPI ..... PETITIONER

VS.

FIRST NATIONAL BANK IN MERIDIAN ..... RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

ORIGINAL BRIEF FOR RESPONDENT

May it Please the Court:

Certiorari was granted herein by this court to the United States Circuit Court of Appeals for the Fifth Circuit on May 18, 1936, limited to the question of the jurisdiction of the District Court.

NOTE:—All *Italics* ours unless otherwise indicated.

James B. Gully, State Tax Collector, for the State of Mississippi, for the use and benefit of that state and certain of its political subdivisions and taxing districts, filed suit in the Chancery Court of Lauderdale County, Mississippi, against First National Bank *in* Meridian. For the bill of complaint and the exhibits thereto see Transcript, pages 1 to 40, inclusive.

Within the time which it was allowed to plead, answer or demur to the bill under the laws of the State of Mississippi, respondent filed a petition and bond for the removal of the cause to the District Court of the United States for the Eastern Division of the Southern District of Mississippi. (Transcript, pp. 40 to 44, inclusive.)

The state court entered its order transferring the case to the United States District Court. Petitioner's motion to remand (Transcript, p. 47) was overruled by the District Court.

Respondent filed an answer (Transcript, pp. 47 to 64, inclusive) and incorporated therein at the conclusion thereof, a motion to dismiss. (Transcript, pp. 64 to 67, inclusive.)

Petitioner thereupon asked leave to amend the bill of complaint. (Transcript, pp. 67 to 70, inclusive.)

Respondent objected to the proposed amendments in writing. (Transcript, pp. 70 to 73, inclusive.)

The District Court denied the motion to amend the bill. (Transcript, p. 73.)

Thereupon the motion to dismiss was heard and argued at the September Term 1934 of the District Court and at the conclusion of the hearing, the court announced orally its opinion that the motion to dismiss should be sustained. (Transcript, p. 80.)

Petitioner asked the court to withhold entry of decree and to take the case under advisement for thirty days to enable petitioner to determine whether or not to ask leave to amend. Pe-

titioner then filed a second motion for leave to amend the original bill on November 1, 1934. (Transcript, p. 76.) To this second application to amend, respondent filed written objections. (Transcript, pp. 80 to 83, inclusive.)

On further hearing, the District Court entered final decree in favor of respondent on the 27th of March, 1935, wherein the court adjudged that the bill of complaint if amended as prayed, would still state no cause of action against the respondent; that the doing of complete justice did not require the allowance of the proposed amendments; that the assessment of the taxes sought to be recovered and relied upon in the bill of complaint were not the equivalent of a tax upon the shareholders, were wholly void as being contrary to the laws of the United States and of the State of Mississippi and beyond the power of the taxing authorities and unenforceable; that the taxes sued for were not a lien upon the assets of the old First National Bank *of* Meridian in the hands of the Receiver thereof; that neither the old bank nor its Receiver were estopped to assert the invalidity of such assessments; that the motion for leave to amend the bill of complaint should be overruled; and the petitioner, asking no further leave to amend, but declining to plead further, the motion to dismiss should be sustained. (Transcript, pp. 84 to 86).

Petitioner appealed to the Circuit Court of Appeals for the Fifth Circuit at New Orleans, assigning several alleged errors. (Transcript, pp. 87 to 88).

One of the assignments of error is to the effect that the District Court erred in refusing to remand the cause to the state court.

The Circuit Court of Appeals on January 18, 1936, affirmed the decision of the District Court in an opinion whereby it upheld the judgment of the District Court in retaining jurisdiction of the cause, in overruling the applications for leave to

amend and in dismissing the bill of complaint. (Transcript, pp. 93 to 101, inclusive.)

Respondent respectfully submits that the District Court and the Circuit Court of Appeals were correct in holding that the case was properly removed from the state court.

It is significant that the entire case was disposed of in the lower court on the pleadings of the petitioner.

REPLY TO PETITIONER'S POINT I

The suit is clearly one that arises under the laws of the United States. This we submit affirmatively appears from petitioner's own pleading, which we will here analyze.

PETITIONER'S CLAIM IN THE BILL

Petitioner's bill of complaint against respondent, First National Bank *in* Meridian (hereinafter referred to as the "new bank") sought recovery of it of the taxes here involved upon the following propositions set forth in the bill to-wit:

a. That First National Bank *of* Meridian (hereinafter for convenience and brevity referred to as the "old bank") was on and prior to January 1, 1930 and throughout the entire year 1930 and until January 13, 1931, a national banking association domiciled and doing business in the City of Meridian.

b. That during the year 1930, the old bank was subject to taxation by the state and its political subdivisions "upon its capital stock, surplus and undivided profits."

c. That in the year 1930, the old bank "in strict compliance with the laws of the State of Mississippi", acting through proper officers "made due and legal report or return to the Tax Assessors of Lauderdale County, Mississippi, of the number and amount of all the shares of its capital stock paid in and of the sum of all undivided profits, surplus and accumulation of every

sort *constituting a part of the assets of said First National Bank of Meridian* excluding its real estate." See Paragraph 8, Transcript, p. 2.

d. That upon such return, the Tax Assessor of Lauderdale County "proceeded according to law to assess the said capital stock, surplus and undivided profits to said First National Bank *of* Meridian for the state and county taxes for the year 1930."

e. That such assessment was in words and figures as follows, to-wit:

"Page 12

"Name—Bank, First

"Bank's capital stock, surplus and undivided profits, less book value of real estate. $540,135.00

"Total Valuation of all Personal Property. . $ 540,135.00"

f. As to taxes alleged to be due the City of Meridian and the Separate School District thereof, petitioner's bill alleged (Transcript, p. 6, Par. 21 of the bill) that the old bank through proper officers "in strict compliance with the laws of the State of Mississippi and the charter, charter amendments and ordinances of the City of Meridian" likewise "made due and legal report or return" to the taxing officers of the City of Meridian, "of the number and amount of all the shares of its capital stock paid in and of the sum of all undivided profits, surplus and accumulation of every sort constituting a part of the assets of First National Bank *of* Meridian excluding its real estate."

g. That upon such return, the taxing officer "proceeded according to law to assess said capital stock, surplus and undivided profits to said First National Bank *of* Meridian", the old bank, for the year 1930.

h. That the entry upon the City Assessment Roll was in the following words and figures:

"First National Bank;

"2600 shares capital stock	$260,000.00
Surplus and Undivided Profits	313,890.00
	$573,890.00
Less Real Estate	33,700.00
	$540,190.00
Total Value of all Personal Property	$540,190.00
Total Tax on same	$ 13,504.75"

i. That the assessments aforesaid on the state and county and city assessment rolls were confirmed by the taxing boards.

j. That the taxes alleged to be due the State of Mississippi and the County of Lauderdale "were due by the shareholders of the said First National Bank *of* Meridian but said First National Bank *of* Meridian was, by law, liable to pay said taxes as the agent of each of its shareholders and was authorized to pay same out of their individual profit account, or to charge same to their expense account or to any other account which said shareholders might have with said Bank, all in proportion to their ownership." Par. 16 of the bill, Transcript, p. 5.

k. A similar allegation was made as to the taxes claimed to be due the City of Meridian and the Separate School District. Par. 28 of the bill, Transcript, p. 8.

1. In paragraphs 17 and 18 of the bill, Transcript, p. 5, it is charged that under the law, the taxes due the state and county "became and were debts due by the several shareholders of said First National Bank *of* Meridian"; and that it was the duty of the First National Bank *of* Meridian, the old bank, to pay same "on or before the 1st day of December 1930 and to charge same

to the individual profit accounts of its said shareholders, or to their expense accounts or to any other accounts said shareholders might have had with said Bank." Like allegations are made as to the taxes claimed to be due to the City of Meridian and Separate School District in paragraphs 29 and 30 of the bill.

m. By the 31st paragraph of the original bill, (Transcript, p. 9), it is charged as follows:

> "That during the period from January 1st, 1930, to January 13th, 1931, and also during the period from April 1st, 1930, to January 13th, 1931, and also during the period from December 1st, 1930, to January 13th, 1931, the said First National Bank *of* Meridian had in its possession and under its control divers large sums of money belonging to its said share holders, said money being both dividends declared upon the said shares as well as money on deposit in said bank to the separate accounts of said shareholders. The exact amount of such dividends and deposits is unknown to your complainant, but upon information which he believes to be true, he avers that same was as to each and every of said shareholders largely in excess of each shareholder's pro rata portion of the total taxes due the State of Mississippi, the County of Lauderdale, the City of Meridian and the Meridian Separate School District as hereinbefore set forth."

n. That the old bank did not pay the taxes on or before December 1, 1930 "out of the funds and monies of its shareholders then and theretofore in its possession" but "wholly failed, neglected and refused so to do and thereby became and was liable and indebted directly and primarily" therefor. This latter allegation is purely a legal conclusion of the pleader, having no sufficient predicate in the allegations of the bill, which both the District Court and the Court of Appeals held showed a void

assessment of the taxes in contravention of the law of the United States.

o. By the 33rd paragraph of the bill (Transcript, p. 10), it is alleged that on the 13th of January, 1931, the old bank "became insolvent, suspended business and was thereafter duly liquidated by a receiver appointed by the Comptroller of the Currency".

It is manifest that the foregoing averments of the bill of complaint, which will be found within the first thirty-three paragraphs thereof, constituted an attempt by the petitioner to establish that the taxes claimed had been legally assessed and had become a primary obligation of the old bank at the time it became insolvent, suspended business and was placed in the hands of a receiver appointed by the Comptroller of the Currency.

Manifestly, the petitioner rightly conceived that he could have no standing in any court unless he could show a claim for taxes legally assessed and constituting a primary obligation of the First National Bank *of* Meridian, the old bank, at the time of its insolvency. But such assessment of such taxes and the obligation of the old bank to pay it, and its existence as a primary obligation of the old bank at the date of the receivership depend entirely upon the law of the United States, Title 12, U. S. C. A., Section 548.

To aver the assessment and levy of the taxes as an exisiting liability of a national bank, whether the pleader specifically refers to the laws of the United States or not in express terms, necessarily asserts and claims a right which exists only by virtue of the laws of the United States and which can be enforced only if in accord with that law. To say that a tax sought to be enforced against a national bank is a lawful tax, is to say that it is lawful under the laws of the United States because the tax depends primarily upon that law, and the law of the United States is an essential ingredient of the right to tax a national bank.

Reverting again to the allegations of the bill of complaint, it is further charged:

p. That the respondent, First National Bank *in* Meridian, was organized between the 13th of January, 1931, (the day the old bank became insolvent and suspended business), and the 12th of July, 1931, "for the purpose of acquiring the assets of the insolvent First National Bank *of* Meridian and engaging in the banking business.

q. That about June 4, 1931, respondent purchased of the receiver of the old bank "certain of the assets" of the old bank, and that the purchase and sale aforesaid was evidenced "by a written contract or agreement entered into between said receiver and said First National Bank *in* Meridian pursuant to a decree of the District Court of the United States for the Eastern Division of the Southern District of Mississippi." A copy of such contract is Exhibit F to the bill of complaint.

r. That by the terms of the said contract, Exhibit F to the bill, (for which see Transcript, pp. 28 to 38, inclusive), respondent "assumed and became liable for all of the debts and liabilities of the First National Bank *of* Meridian" (the old bank) "including among others its debt and liability for all of the taxes hereinbefore mentioned." (Transcript, p. 10, par. 36 of the bill.)

But such allegation is a legal conclusion of the pleader and since the pleader made the contract Exhibit F to the bill, its terms, rather than the legal conclusions of the pleader, will control. *Home Insurance Company v. Newman,* 111 So. 455, 147 Miss. 237. The contract, Exhibit F, nowhere expressly assumed the payment of the alleged taxes. Indeed they were not referred to therein. Petitioner was not a party to such contract.

It will be noted that it is not alleged in the bill that respondent did not comply with its contract with the receiver to deliver to him the various claims which the new bank held under a creditors agreement with creditors of the old bank, which creditors' a-

greement was an exhibit to, and part of, the contract, Exhibit F to the original bill, nor that it did not comply with its agreement to deliver to the receiver the amount of money specified, to enable the receiver to pay in full the claims of all known creditors who had not executed the aforesaid creditors' agreement. Nor was it alleged that the respondent had failed to pay the receiver any further sums demanded by him from time to time during the period of the active receivership, which the receiver might deem necessary to meet receivership expenses and to provide for the payment of "such unlisted or unknown claims as may be established during the period of active receivership."

s. By the 37th and 38th paragraphs of the bill of complaint, (Transcript, p. 10), it is alleged that the claimed taxes had not been paid by the new bank, nor by any person or corporation whatsoever.

At this point, we submit, it will be helpful on the point of jurisdiction to consider somewhat in detail, the contract, Exhibit F to the bill of complaint.

ANALYSIS OF THE CONTRACT BETWEEN THE RECEIVER OF THE OLD BANK AND THE NEW BANK, EXHIBIT F TO THE ORIGINAL BILL OF COMPLAINT.

Exhibit F, which bears date June 4, 1931, is found beginning on page 28 of the Transcript. C. P. Rogers, receiver of the old bank is referred to as the "party of the first part", and respondent, the new bank, is referred to as "the purchaser, party of the second part".

The second, third, fourth and fifth paragraphs of Exhibit F begin with the term "whereas" and contain certain recitations, which, however, are not the obligations that the parties to the contract assumed. (Transcript, pp. 28, 29)

The actual obligations entered into by the parties are contained in paragraphs specifically numbered 1, 2, 3, 4 and 5. (Transcript, pp. 29 to 33, inclusive).

In the clauses preliminary to the actual contract between the parties, (Transcript, pp. 28, 29), it is in substance recited that the old bank had suspended the 13th of January, 1931; that C. P. Rogers was the duly appointed and qualified receiver of the old bank; that approximately 90.59% in amount of the unsecured depositors and creditors of the suspended bank "have heretofore, for the purpose of facilitating the organization of a new bank to acquire the assets of said suspended bank *so as to enable said assets to be liquidated by said new bank as a going concern rather than to subject said assets to liquidation through a receivership*", executed certain contracts to a committee whereunder they assigned their claims to such committee for the purpose of enabling such claims to be transferred to, and utilized by, said new bank in purchasing and acquiring the assets of the suspended bank, a draft of the form of such creditor's agreements being made Exhibit 1. This Exhibit 1, entitled "Creditor's Agreement", will be found beginning page 34 of the Transcript. It was further recited that the new bank had been organized and authorized to do business by the Comptroller of the Currency and had acquired from the committee of creditors named in the creditor's agreement, Exhibit 1 to the contract, Exhibit F, the assigned claims aggregating approximately 90.59% in amount of the unsecured creditors of the suspended old bank; and that the new bank was ready and willing as purchaser under the contract, Exhibit F, to acquire the assets of the suspended bank (the old bank) and in consideration thereof "will surrender to the receiver canceled and discharged receiver's certificates representig the claims of the creditors executing the aforesaid creditors agreements aggregating approximately the said sum of $3,264,765.68, and in addition thereto said purchaser will assume and pay in full with interest the claims of all other creditors against said suspended bank, whether said claims be known or unknown, which

may be duly established according to law, and in addition will assume and pay in full all expenses of the receivership of said suspended bank, both accrued and to accrue, including the customary charge of the Comptroller of the Currency for supervision of the receivership."

After making the foregoing recitals, the contract then proceeds (Transcript, p. 29) "it is, by the parties hereto, in consideration of the mutual promises and covenants to each other hereunto flowing, as hereinafter set forth, agreed as follows". Then follow the paragraphs numbered 1, 2, 3, 4 and 5 of the contract, Exhibit F. (Transcript, pp. 29 to 33).

By paragraph numbered 1 (Transcript, p. 29), the new bank, respondent, bought, and the receiver sold, all of the assets of the suspended bank (the old bank) "exclusive of assessment liability of shareholders and liability if any, of directors of said suspended bank." It was, also, stipulated, however, in paragraph numbered 1, that respondent, the new bank, should acquire no right to take over and maintain the trust department business of the suspended bank (the old bank).

The method of payment for such assets is set forth in paragraph numbered 2, (Transcript, pp. 30, 31), as follows:

(a) Surrender to the receiver all canceled receiver's certificates for approximately 90.59% in amount of the claims of known unsecured depositors and creditors of the suspended bank.

(b) The sum of $397,888.78 "representing the amount necessary to pay all receivership expenses accrued and to accrue and to enable the receiver to pay in full with interest to the date of payment the claims of all known creditors who have not executed the aforesaid creditors agreement (it being the intention and purpose of the parties hereunder that the aforesame sum of $397,888.78 hereunder paid, together with the cancellation, surrender and return of the aforesaid receiver's certificates representing the claims of creditors executing the above mentioned creditors agree-

ments shall together completely discharge, or enable the receiver to discharge, the claims of all known creditors of said suspended bank and meet in full all receivership expenses accrued and to accrue and meet in full all receivership expenses accrued and to accrue during the period said receivership is, in the discretion of the Comptroller of the Currency, continued in active operation), and said purchaser will pay the receiver such further sums from time to time, during the period of active receivership, as the receiver may deem necessary to meet receivership expenses and to provide for the payment of such unlisted or unknown claims as may be duly established *during the period of active receivership.*"

It was further stipulated that the $397,888.78 might at the option of the receiver be retained by the receiver from the cash assets in his hands.

It was, also, agreed that in the event the $397,888.78, together with such further sums so paid as the receiver may from time to time deem necessary, should be found by the Comptroller of the Currency to be more than sufficient to pay said receivership agreements, the surplus would be paid by the receiver to the trustees provided for in the creditors agreements, a form of which was Exhibit 1 to the contract, Exhibit F.

By paragraph numbered 3 of the contract, Exhibit F, (Transcript, p. 31), the respondent, the new bank, as purchaser agreed that the purchase, as to the assets which it would acquire but was obligated to transfer to the trustees under the creditor's agreement, Exhibit 1, (Transcript, p. 34), for liquidation in the manner therein provided, should be subject to the requirement that in liquidating the trusteed assets, an accurate record should be kept thereof; and that after the trusteed assets referred to in the creditors' agreemnet, Exhibit 1, (Transcript, p. 34), had been liquidated pursuant thereto and the amount due creditors thereunder had been paid in full with interest, (without, however, any obligation upon the respondent, the new bank, to pay the portion

of the claims of depositors and creditors represented in the trusteed assets or any interest thereon), "the surplus, if any, then remaining, and/or the portion, if any, of such trusteed assets then unliquidated, shall be held for the account of the shareholders of said suspended bank and for payment and/or delivery to such representative or trustee of said shareholders as may be designated by said shareholders to receive said surplus so remaining."

The respondent, also, agreed in said paragraph numbered 3 of the contract, Exhibit F, (Transcript, p. 31), to transfer to the trustees under the creditors' agreement and in accordance therewith all of the assets turned over to it by the receiver under the contract, to be liquidated by such trustees pursuant to the terms of such creditors' agreement, Exhibit 1 (Transcript, p. 34), except certain assets which the respondent should retain absolutely as its own property. The assets which the new bank was to retain absolutely as its own property and the only assets that it could retain absolutely as its own property are listed, (Transcript, p. 32), as follows:

(a) All furniture and fixtures at an agreed valuation of $37,399.94;

(b) All real estate at an agreed valuation of $41,362.60;

(c) All claims and warrants (other than notes and bills receivable) at an agreed valuation of $24,891.63;

(d) All stocks at an agreed valuation of $1,352.00;

(e) All Bonds at the prevailing market value as of date of delivery by the receiver to said purchasing bank.

(f) A sufficient amount of notes and bills receivable, at face value as of date of suspension (exclusive of all uncollected interest upon said notes and bills receivable) to be selected by the purchasing bank, as shall, together with the assets enumerated in the foregoing sub-paragraphs a, b, c, d, and e, equal the

amount of the liabilities of the creditors absolutely assumed and agreed to be paid by the purchasing bank under said creditors' agreements.

The transfer of assets under the contract, Exhibit F, was specifically made without recourse or warranty on behalf of, or against, either the suspended bank, (the old bank), or the receiver. (Transcript, p. 33). The receiver, also, agreed to turn over to the respondent, all the contracts for rental of safety deposit boxes and all safe keeping items and the respondent, the new bank, assumed responsibility therefor.

In paragraph numbered 5 (Transcript, p. 33), the respondent obligated itself to furnish suitable quarters on its banking premises to the receiver, including light, heat, janitor service, vault space, use of furniture and fixtures such as might be considered by the receiver as necessary for the receivership purposes during the period of the active receivership.

For a further understanding of the contract between the respondent, the new bank, and the receiver, reference should, also, be made to the creditors' agreement, Exhibit 1 thereto, set forth pages 35 to 38, inclusive, of the Transcript.

CREDITORS' AGREEMENT, EXHIBIT 1 TO CONTRACT, EXHIBIT F TO THE ORIGINAL BILL, ANALYZED.

This creditors' agreement was by the terms of the contract, Exhibit F, expressly made a part of it, and explains, as well as characterizes the contract, Exhibit F as being one expressly intended and actually having the effect of, providing for the liquidation of the old bank, First National Bank *of* Meridian by the new bank, First National Bank *in* Meridian, through trustees referred to in the creditors' agreement and in the manner set forth in the contract, Exhibit F, and in such creditors' agreement.

From the creditors' agreement, it appears that prior to the actual organization of the new bank, creditors of the old bank transferred their claims to a committee for the proposed new bank (the present respondent) upon the understanding that such committee would establish the claims of such creditors as made assignments of their claims to the committee, and would obtain a receiver's certificate therefor, unless one had already been issued to the assignor, with the further understanding that when the new bank was organized with a cash capital of $400,000.00 and a cash surplus of $100,000.00, such claims would be transferred to it by the committee.

The obligations assumed by the new bank to the creditors assigning their claims under the creditors' agreement, which was, also, a part of the new bank's contract with the receiver, were as follows, as set forth in paragraph III of the creditors' agreement:

1. To pay such creditors who assigned their claims 75% thereof in installments as follows: 10 percent on the opening of the new bank; 15 percent twelve months from the date thereof; 25 percent twenty-four months thereafter, and 25 percent thirty-six months thereafter, all without interest.

2. As to the remaining 25 percent of the assigned claims, the new bank did not assume nor agree to pay same, but did obligate itself to set apart in a trust fund and transfer to trustees to be named by the board of directors of the new bank, approximately $1,254,760.09 par value of certain loans and discounts of the old bank to be acquired of the receiver thereof by the new bank, such assets to be liquidated by the trustees on the following terms:

a. The trustees should convert the same into cash without compensation to themselves and without expense except such as is necessarily incurred in the process of liquidating same.

b. During two years from the date of the opening of the new bank, it was to have the right to substitute any assets in its hands acquired from the receiver of the old bank for a corresponding amount of cash in the hands of the trustees derived by them from liquidating the trusteed assets and the right to substitute in lieu of cash by it delivered to the trustees, a corresponding amount of trusteed assets if the new bank should so elect, and the right to exchange with the trustees any assets of the new bank acquired from the First National Bank *of* Meridian for a corresponding amount of trusteed assets, all with proper adjustments of interest, with the further right in the new bank to be reimbursed by the trustees, the expenses of the receivership of the old bank accrued and to accrue during the period of the receivership. The primary object of this provision as is manifest upon a consideration of it, was to insure the solvency of the new bank and its being able to perform its obligation to pay to the creditors who assigned their claims within the period of three years as stipulated in the creditor's agreement, the 75% of their claims which the new bank would assume.

c. After the expiration of the two years within which the new bank would have the right of substitution and exchange of assets as aforesaid, the trustees were then to distribute from time to time to the creditors who assigned their claims, the proceeds of the liquidation of the trusteed assets, applying same toward the payment of the remaining 25% of their claims against the old bank, which the new bank had not assumed, but which were to be taken care of out of the trusteed assets, if sufficient to pay the same. The distribution to the creditors who assigned their claims, of the proceeds of the liquidation of the trusteed assets after the expiration of two years, was to be in ratable proportion to the amount of their respective claims. If, after applying the proceeds of the trusteed assets ratably and proportionately to the discharge of the 25% of the claims of the creditors signing the agreement against the old bank which the new bank had not assumed, together with interest thereon in full, any amount re-

mained in the hands of the trustees, such excess was to be distributed ratably to the shareholders of the old bank.

d. The trustees were given in paragraph d of section III of the creditors' agreement (Transcript, p. 36) large powers as to foreclosing liens, reducing notes to judgment, selling and conveying real and personal property, and other of the trusteed assets, and to settle and compromise with debtors of the trust estate "on such terms as the trustees may deem advisable by and with the approval of the board of directors of the new bank." The new bank, as the Court will see, was not only required to name the trustees and transfer the trusteed assets to them, but to control their actions through its board of directors. This is made more emphatic by paragraph f of section III (Transcript, p. 37) whereby the board of directors of the new bank might require the trustees to render accounts to them, might exact bond of them for the faithful discharge of their duties, might remove any trustee at any time, with or without cause, might fill any vacancy in the office of the trustees occasioned by their removal, or resignation, or death or inability to serve.

The new bank and the trustees were authorized by the creditors' agreement to execute a trust agreement as to the assets agreed upon to be trusteed on the terms set forth in the creditors' agreement.

The creditors signing the creditors agreement accepted in full of their claims, the obligation of the new bank to pay absolutely 75% thereof in the manner hereinabove stated and such amounts as might accrue to them out of the liquidation of the trusteed assets by the trustees named and supervised by the new bank on the conditions of the trust as set forth in the creditors' agreement.

The creditors' signing this agreement of course, were doing so in advance of the organization and opening of the new bank. Consequently, by section V of the creditors' agreement,

(Transcript, p. 38), the creditors signed and agreed to be bound thereby on the following subsequent conditions, namely:

1. That the new bank should be organized and opened and purchase the assets of the old bank from the receiver thereof, "as provided by law". This could only mean of course, the laws of the United States. The new bank could not be organized nor opened nor purchase the assets of the old bank of the receiver thereof, except pursuant to the laws of the United States.

2. That the new bank would assume 75% of the claims of the creditors signing the agreement, absolutely, and would place in accordance with the terms of the creditors' agreement, in trust the stipulated amount of loans and discounts, approximately par value $1,254,766.09, for the primary purpose of applying the net proceeds of the liquidation thereof by the trustees, after the new bank should have had its agreed rights of substitution and exchange of assets with the trustees for two years, toward the liquidation of the remaining 25% of the claims of the creditors signing the agreement.

3. That in the event the new bank did not open within four months of February 15, 1931, the committee would retransfer the claims and receiver's certificates issued therefor, to the creditors signing the agreement.

In the light of the foregoing allegations of the original bill of complaint and the contract, Exhibit F to the bill, we submit it appears from the petitioner's own pleadings that the suit necessarily arises under, and depends upon, the laws of the United States and requires the construction and application of such laws to the state of facts presented by the petitioner on his pleadings. Indeed, the case was decided both in the District Court and in the Circuit Court of Appeals with reference to the laws of the United States. The case cannot be decided, we respectfully submit, without construing and applying the laws of the United States.

Summarizing the Federal questions presented by the petitioner's pleadings as we conceive them to be, they are as follows:

1. The right to tax a national bank or the shares of its stock is grounded upon the laws of the United States. National banks are Federal Agencies. The state and its political subdivisions are without authority to tax national banks or national banks' stock except by permission of Congress. The laws of the United States do not simply limit a theretofore existing general right of the states to tax national banks, but are the sole source of the States' authority in such matters.

2. For petitioner to maintain the right to collect the taxes claimed, he must show that the assessments of such taxes conform to the provisions of Section 5219, Revised Statutes, Section 548 of Title 12, U. S. C. A. and are such as are permitted by that statute. The validity vel non under the Federal law of the assessments is a fundamental question presented on the face of petitioner's pleadings, and the District Court and Court of Appeals decided that question on the petitioner's pleadings in the light of the Federal statutes, against the petitioner, upon the respondent's motion to dismiss, which of course, has the same effect as a demurrer would have under the old practice.

3. But, regardless of the validity vel non of the assessments of the taxes under Section 5219 of the Revised Statutes, before petitioner could recover, it was further necessary on petitioner's pleadings, to determine whether or not under the laws of the United States, the failure of the old bank to pay these taxes which the petitioner claimed were originally a debt of the shareholders, prior to its suspension, imposed upon the old bank under the laws of the United States a direct obligation to pay same.

4. It was, also, a question under the facts alleged in the bill, as to whether or not the taxes sued for, constituted a claim

provable against the receiver, under the laws of the United States, and payable by him out of the assets of the insolvent bank in his hands. Even though the receiver was not originally made a formal party to the suit, it was certainly essential to petitioner's right to avail of the contract between the new bank and the receiver, Exhibit F to the bill, to establish that the taxes were payable by the receiver out of the assets of the old bank. Unless the taxes were enforceable against the receiver, and payable out of the assets of the old bank in his hands, there is no term of the contract between the receiver and the new bank, the respondent here, which could possibly be construed as in anyway obligating the respondent to pay such taxes. In other words, the applicability of the contract, Exhibit F, necessarily turned upon whether or not under the laws of the United States, the petitioner's claim was one that the receiver could legally pay, and was obligated to provide for and did provide for, in the contract for the sale of the assets of the old bank to the new bank.

5. The existence, validity and enforceability of the contract between the receiver and the respondent, Exhibit F to petitioner's bill of complaint, were necessarily asserted by the petitioner. The solution of these questions turned upon the laws of the United States with reference to the administration of the assets of insolvent national banks. The authority of the receiver to make the contract, depended upon the laws of the United States. Unless the contract between the receiver and the respondent conformed to the applicable laws of the United States with reference to administering the assets of an insolvent bank, it could not be held to be valid nor enforceable.

The above Federal questions presented by the petitioner's pleadings necessarily involved the construction and application of Section 5219, Revised Statutes, Section 548, Title 12, U. S. C. A. and those statutes prescribing the rights and duties of receivers in winding up insolvent national banks, Section 5234, Revised Statutes, Section 192, Title 12, U. S. C. A. Therefore,

the suit is one which arises under the laws of the United States within the meaning of Section 41 (1, a), Title 28, U. S. C. A., and Section 41, Par. 16.

6. Petitioner's bill of complaint, also, sought recovery of the taxes upon the theory that the respondent had purchased all the shares of stock of all the shareholders of the old bank and that the consideration for such purchase was that the respondent "should, after its organization and opening relieve the said shareholders of all statutory liability imposed upon them as shareholders in said First National Bank *of* Meridian." See paragraph 39 of the original bill, Transcript, p. 10.

The contracts upon which this allegation was based, are made Exhibits H and I to the original bill. It was claimed in the bill that these contracts were made during the promotion or organization of the respondent bank, and that upon its organization, it ratified and confirmed same. (Transcript, p. 11).

The contracts, Exhibits H. and I, will be found, pages 39 and 40 of the Transcript.

These contracts are to be construed in the light of the provisions of the creditors' agreement signed by some 90% or more of the creditors of the old bank, Exhibit 1 to Exhibit F to the bill of complaint, and found, Transcript, pp. 34 to 38, inclusive, which contract, we have heretofore analyzed and reviewed.

The contracts, Exhibits H and I, are especially to be interpreted in connection with paragraph e of the creditors' agreement. (Transcript, p. 36).

As a part of its contract with the receiver, made with the approval of the Comptroller of the Currency, the new bank, which was authorized by the Comptroller to begin business subsequent to the insolvency of the old bank, was obligated to supervise the liquidation of the trusteed assets, and the contract, Exhibit F and the creditors' agreement, Exhibit 1 thereto, mani-

fest the intent of the contract on the part of the receiver and the Comptroller of the Currency to assure the ability of the new bank to perform its agreement as to the 75% which it agreed to pay to the creditors who signed the agreement, Exhibit 1, and its ability to carry out its obligations under the contract to supervise and require the completion of the liquidation of the trusteed assets, and its ability to be in position during the period of the active receivership to respond to the demands of the receiver for funds with which to pay any unknown claims established during the period of the active receivership.

The bill shows that the shareholders acquiesced in the contract, Exhibit F, by transferring, on the terms of the contracts, Exhibits H and I, their stock to the new bank, not upon the theory that the new bank would assume and pay the shareholders' statutory liability, but that the accomplishment of the plan of liquidation manifested by the contract, Exhibit F and Exhibit 1 thereto, would have the logical effect when worked out, of leaving no statutory liability to be assessed upon the shareholders by the Comptroller of the Currency and would thereby relieve the said shareholders of such statutory liability. There was no agreement of the new bank to assume the shareholders' statutory liability for assessment against their shares by the Comptroller of the Currency. The Comptroller could not sell that liability, the bank could not, but if the liquidating plan evidenced by the contract, Exhibit F and the creditors' agreement, Exhibit 1 thereto, worked out, the necessary effect of it would be that the Comptroller of the Currency would not assess any of the shareholders on account of statutory liability. Therefore, the language of the assignment of the shareholders of the old bank to the new bank, Exhibits H and I was an indemnity on the part of the new bank to the shareholders of the old bank against assessment by the Comptroller of the Currency of any liability as such shareholders expressed by the new bank agreeing to hold such shareholders harmless with reference thereto.

It will be noted that the new bank had until June 1934 within which to complete the payment of the 75% which it had agreed to pay the creditors who signed the creditors' agreement. The new bank's agreement to hold the shareholders harmless against statutory liability being assessed against them by the Comptroller was in effect nothing more than a promise to the shareholders that the new bank would carry out the plan of liquidation outlined in the contract, Exhibit F, and the creditors' agreement, Exhibit 1 thereto.

It will be noted, also, that the new bank agreed that if, after the liquidation was completed anything remained, it would be distributed to shareholders under the terms of the creditors' agreement, Exhibit 1 to the contract, Exhibit F. The assignment of the shareholders of their stock to the new bank must be considered in the light of the contract, Exhibit F and the creditors' agreement, Exhibit 1 thereto. In effect it was the assent of the stockholders to the plan of liquidation set forth in the creditors' agreement and the contract, Exhibit F, with the understanding that anything realized out of the assets of the old bank pursuant to that plan of liquidation which was committed to the new bank, should eventually inure to the shareholders of the old bank. Not a penny was to inure to the new bank from the assignment to it by the shareholders of the old bank. As a matter of fact, since the bill alleges that all the shareholders executed the assignments, Exhibits H and I, it affirmatively appears therefrom that what actually took place was and is that the new bank became by unanimous assent of all the shares of the old bank and by the approval and consent of the receiver of the old bank and the Comptroller of the Currency, the statutory agent for winding up the old bank under the laws of the United States, 12 U. S. C. A., Section 197.

This is true notwithstanding the fact that the trusteed assets were placed in the hands of trustees. The new bank had to name, and had to control absolutely, the trustees in the matter

of their liquidation of the assets turned over to them. It would seem to us that there can be no doubt when the contracts here sued on are properly construed and understood that the petitioner's suit is one for the winding up of the affairs of an insolvent national bank and indeed, is against the statutory agent of the shareholders under the laws of the United States.

The Court of Appeals correctly construed the contracts, Exhibits H and I, as being applicable to the liability to be assessed on the stock to pay the bank's debts under Title 12 U. S. C. A., Section 64 and not as relating to any possible liability of shareholders for back taxes. The Court of Appeals further said with reference thereto, "moreover, there is no assumption but only an agreement to hold harmless, which would not justify a direct suit by the holder of an obligation".

The final determination, however, of the question raised by the petitioner with reference to the phase of the suit presented by Exhibits H and I to the bill of complaint in no way effects the fundamental proposition that petitioner's suit when correctly analyzed, and Exhibits H and I are considered in the light of the other allegations of the bill of complaint and especially, the creditors' agreement, Exhibit 1 to the contract, Exhibit F to the bill of complaint, is a suit against the respondent bank which by its contract with the receiver undertook to liquidate through trustees appointed by it, more than $1,000,000.00 of face value of assets turned over to it by the receiver and to distribute the proceeds of such liquidation, first to creditors signing the creditors' agreement and thereafter as to any excess remaining, to the shareholders of the old bank, in which liability is sought to be predicated of contracts which constituted respondent a statutory agent of shareholders.

AUTHORITIES SUBMITTED

The proposition that this suit arises under the laws of the United States is sustained by the following authorities:

It has long been established that any suit by or against a national bank involves a federal question. The decisions of the United States Supreme Court are based upon unanswerable grounds, stated in language pertinent to the present case.

Chief Justice Marshall, in *Osborn v. United States Bank,* 9 Wheaton 738, lays down the fundamental principles applying to a national bank, as follows:

> "The charter of incorporation not only creates it, but gives it every faculty which it possesses. The power to acquire rights of any description, to transact business of any description, to make contracts of any description, to sue on those contracts, is given and measured by its charter, and that charter is a law of the United States. This being can acquire no right, make no contract, bring no suit, which is not authorized by a law of the United States. It is not only itself the mere creature of a law, but all its actions and all its rights are dependent on the same law. Can a being, thus constituted, have a case which does not arise literally, as well as substantially, under the law?
>
> "Take the case of a contract, which is put as the strongest against the bank.
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> * * * * * * * * * * *
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> "The appellants say, that the case arises on the contract; but the validity of the contract depends on a law of the United States, and the plaintiff is compelled, in every case, to show its validity. The case arises emphatically under the law. The act of congress is its foundation. The contract could never have been made, but under the authority of that act. The act itself is the first ingredient in

the case, is its origin, is that from which every other part arises. That other questions may also arise, as the execution of the contract, or its performance, cannot change the case, or give it any other origin than the charter of incorporation. The action still originates in, and is sustained by, that charter."

This decision has never been modified or reversed, and its reasoning has never been questioned. It has frequently been cited and its language quoted with approval. It is still the established doctrine of the Supreme Court that any suit by or against any national bank arises under the statutes of the United States. The effect of incorporation under the National Banking Act as stated by Mr. Justice Field, fully and strongly substantiates and justifies the foregoing statement.

"* * * We consider that act as constituting by itself a complete system for the establishment and government of national banks, prescribing the manner in which they may be formed, the amount of circulating notes they may issue, the security to be furnished for the redemption of those in circulation; their obligations as depositaries of public moneys, and as such to furnish security for the deposits, and designating the consequences of their failure to redeem their notes, their liability to be placed in the hands of a receiver, and the manner, in such event, in which their affairs shall be wound up, their circulating notes redeemed, and other debts paid or their property applied towards such payment. Everything essential to the formation of the banks, the issue, security, and redemption of their notes, the winding up of the institutions, and the distribution of their effects, are fully provided for, as in a separate code by itself, neither limited nor enlarged by other statutory provisions with respect to the settlement of demands against insolvents or their estates."

Cook County National Bank v. United States, 107 U. S. 445, 448.

The first restriction on the jurisdiction of federal courts over controversies involving national banks was the act of July 12, 1882, Chapter 290, Section 4, the purport of which is indicated in the decision of Mr. Justice Van Devanter, in *Bankers Trust Company v. Railroad Company,* 241 U. S. 295, 36 S. Ct. 569. After quoting from *Osborn v. Bank,* he says:

> "After the act of March 3, 1875, extended the jurisdiction of the circuit courts to cases arising under the laws of the United States, the ruling just quoted was uniformly followed and applied in suits by and against federal corporations (cases cited), save where the particular suit was withdrawn or excluded from that jurisdiction by some specific enactment, like that of July 12, 1882, Chap. 290, Sec. 4, 22, Stat. at L. 162, Comp. Stat. 1913, Sec. 9665, placing *most* of the suits by and against national banks in the same category with suits by and against banks not organized under the laws of the United States."

The act of July 12, 1882, was repealed, as to any inconsistent provisions, by the act of March 3, 1887, (Chap. 373, Sec. 4), which was replaced by the corrective act of August 13, 1888 (Chap. 866, Sec. 4). Sec. 4, which is identical in both acts, reads as follows:

> "Sec. 4. That all national banking associations established under laws of the United States shall, for the purposes of all actions by or against them, real, personal, or mixed, and all suits in equity, be deemed citizens of the states in which they are respectively located; and in such cases the circuit and district courts shall not have jurisdiction other than such as they would have in cases between individual citizens of the same state.

"The provisions of this section shall not be held to affect the jurisdiction of the courts of the United States in cases commenced by the United States, or by direction of any officer thereof, or cases for winding up the affairs of any such bank."

The Judicial Code (Act of March 3, 1911) states the provision in positive form, instead of by exception or proviso, by providing directly in paragraph (16) of Section 24, that the district courts shall have original jurisdiction as follows:

"Sixteenth. Of all cases commenced by the United States, or by direction of any officer thereof, against any national banking association, and cases for winding up the affairs of any such bank; * * *"

As the law now stands, a case against a national bank may not be removed from the state to the federal court merely because of the federal question arising out of the federal incorporation of such bank. The Congress did not declare that a suit against a national bank as such was not one arising under the laws of the United States, but simply that the mere fact of the incorporation of a national bank under the federal law would not give a right of removal, there being no other federal question involved.

In other words, even though a national bank is incorporated under federal law, the Congress has declared that district courts shall not have jurisdiction other than such as they would have between individual citizens of the same state. But if suit is brought against an individual citizen of a state and arises under the laws of the United States, that individual may remove it to the district court of the United States under Title 28, U. S. C. A., Section 71, reading as follows:

"Any suit of a civil nature, at law or in equity, *arising under the Constitution or laws of the United States,* or treaties made, or which shall be made under their authority,

of which the district courts of the United States are given original jurisdiction, in any state court may be removed by the defendant or defendants therein to the District Court of the United States for the proper district, etc."

Therefore, a suit against a national bank of a civil nature at law or in equity arising under the constitution or laws of the United States, other than the law incorporating a national bank is removable to the district courts.

The precise question here involved was most admirably and fully discussed by United States District Judge, Honorable Edwin R. Holmes, now a Judge of the Circuit Court of Appeals of the Fifth Circuit, in a Mississippi case— *City of Hattiesburg v. First National Bank*, 8 Fed. Supp. 157, especially at page 168, from which we quote as follows:

"The remaining question is whether this is a suit 'arising under the Constitution and laws of the United States'. That depends upon whether the city necessarily relies upon section 5219 of the Revised Statutes of the United States with amendments thereto (12 USCA Sec. 548), as well as upon section 3138, Mississippi Code of 1930, for authority to make the assessment. If so, there is a federal question which arises on the plaintiff's statement of its case; but if the city may properly state its case without invoking the authority of said federal statute or may properly allege facts from which its right to make the assessment may be inferred as a matter of law, without reference to said federal statute, then there is no federal question which necessarily appears from the plaintiff's own pleading. In other words, there is no dispute that there is a federal question in this case, but the contention of the city is that such a question arises only as a matter of defense or as anticipatory of a defense.

"In *Owensboro National Bank v. Owensboro* (1899), 173 U. S. 664, 19 S. Ct. 537, 43 L. ed. 850, upon writ of error to the Court of Appeals of the State of Kentucky, it was held that a state is wholly without power to levy any tax, direct or indirect, upon national banks, their property, assets, or franchises except when permitted to do so by legislation of Congress; that section 5219 of the Revised Statutes was the measure of the power of states to tax national banks; and that the tax, having been assessed on the franchise or intangible property of the corporation, was not within the purview of the authority conferred by the Act of Congress, and was, therefore, illegal. In its opinion, the Court speaks of said section 5219 as a grant of power to the states, and says that any tax not in conformity to it is void. In undertaking to determine the validity of the Kentucky statutes, which sought to tax the franchises of national banks, the Court analyzed the questions presented thus:

" 'Were the taxes complained or levied upon the bank, its property, or franchise, and, if so, were they legal? is the question which, then, arises on the thres' ld of the case.

" 'Two elements are involved in the determination of this question; that is, the extent of the powr of the respective states to tax national banks, and the ascertainment of the scope and purport of the law by which the taxes complained of were levied.

" 'Early in the history of this government, in cases affecting the Bank of the United States, it was held that an agency, such as that bank was adjudged to be, created for carrying into effect national powers granted by the constitution, was not, in its capital, franchises, and operations, subject to the taxing powers of a state.' *Mc-Culloch v. Maryland*, 4 Wheat. 316 (4 Law Ed. 579), *Os-*

born v. Bank of the United States, 9 Wheat. 738, (6 Law Ed. 204).

"The court stated that the first act providing for the organization of national banks contained no 'grant' of power to the states to tax national banks in any form whatever, but the following year the power was 'granted' to tax the shares of stock in the name of the stockholders.

"It follows that in a proper proceeding to tax the shares or surplus of a national bank a state must rely, first, upon the act of Congress which is the measure of its power, and, second, upon its own legislation which has been enacted in conformity thereto. In this case, it must be concluded from the assessment roll, which is the plaintiff's pleading, that it is attempting to tax the bank in reliance upon the federal statute conferring the right in measured terms so to do. As stated by Chief Justice Taft, in the *Arkansas Road District case,* 257 U. S. 547, 42 S. Ct. 250, 66 L. Ed. 364, the city of Hattiesburg is plaintiff, 'asking the Court to give (it) a judgment confirming the assessments.' The book of assessment and the objections of the taxpayer 'make the pleadings.' The proceedings are in Invitum; the bank is the defendant. From the assessment roll it appears inescapably that the assessment is against a national bank, and from that fact the court takes judicial knowledge that it is a fiscal agency of the United States Government which the city is without power to tax except by special grant, and, therefore, concludes as a matter of law that the city is relying upon the federal statute to sustain its right to make the assessment.

"In matters of removal, the federal courts are not bound by the rules of pleading under state procedure in ascertaining what constitutes a case involving a federal question. Even the abolition of written pleadings and a return of pleadings ore tenus, as at ancient common law,

could not take away the right of removal to a federal court under the Constitution and laws of the United States. Regardless of state practice or procedure, the question, which the federal courts must determine for themselves, is whether the plaintiff asserts a right, the correct decision of which, without anticipating defenses, depends wholly or in part upon the application or construction of the Constitution or laws of the United States. Mere references or absence of reference to a federal statute are not conclusive; but it is sufficient, if from the facts alleged it clearly appears, or reasonably follows as a conclusion of law, that a federal law is necessarily relied upon in good faith by the plaintiff as an essential or integral part of his case."

This case is, as said by Chief Justice Marshall in *Osborn v. Bank,* supra, prevaded, from its origin to its close, by United States Law and United States authority.

See, *Young & Jones v. Hiawatha Gin & Mfg. Co.,* 17 Fed. (2nd) 193, another opinion by District Judge E. R. Holmes.

Auburn Savings Bank v. Hayes, 61 Fed. 911;

Boch v. Perkins, 129 U. S. 628, 29 L. Ed. 314;

National Rockland Bank of Boston v. City of Boston, 296 Fed. 643;

Great Northern Ry. Co. v. Galbreath Cattle Co., 271 U. S. 99, 70 L. Ed. 854;

A. G. S. R. R. Co. v. American Cotton Oil Co., 229 Fed. 11 (Fifth Circuit).

A controversy may be truly said to arise under the laws of the United States in all cases where a law of the United States grants a right of property or of action, and a suit is brought to enforce that right, and also wherever it affirma-

tively appears from plaintiff's pleadings that the correct decision of the case depends on the construction of a law of the United States or that some right, title, privilege or immunity on which the recovery depends will be defeated or sustained by the construction of the law.'

See: *Cohens v. Virginia*, 6 Wheat. 264, 5 L. Ed. 257;

Little York Gold Washing & Water Co. v. Keyes, 96 U. S. 100, 24 L. Ed. 656;

Starin v. New York, 115 U. S. 248, 6 S. Ct. 28, 29 L. Ed. 388;

Patton v. Brady, 184 U. S. 608, 22 S. Ct. 493, 46 L. Ed. 713;

Germania Ins. Co. v. Wisconsin, 119 U. S. 473, 7 S. Ct. 260, 30 L. Ed. 461;

Ray v. Paulnot (D. C.), 46 Fed. (2d) 677;

Southern Ry. Co. v. Prescott, 240 U. S. 632, 36 S. Ct. 469, 60 L. Ed. 836;

Bellaire, Benwood & Wheeling Ferry Co. v. Interstate Bridge Co., (C. C. A. 4th), 40 Fed. (2d) 323, 326,

In *Richards v. Incorporated Town of Rock Rapids* (Iowa), 33 N. W. 372, the President of a National Bank appeared before the equalization board on behalf of its stockholders and objected to the assessment as being in excess of that placed upon other moneyed capital. The board refused to equalize the amount as demanded. Appeal was taken to the Circuit Court, and there the defendant asked to remove the case to the Federal Court. The petition to remove was in proper form, but was overruled. Judgment was rendered against it, and on appeal to the Supreme Court of Iowa, the Court said:

"It is not denied that the question involved in the case requires the application of the rule of taxation prescribed by Section 5219 of the Revised Statutes of the United States. The controversy, therefore, involved a Federal question. The fact that the laws of the state prescribed the same general rule does not defeat the jurisdiction of the Federal Courts. If this position be correct, a state might, by re-enacting any Federal Statute, take away the jurisdiction of the Federal Courts. The case is clearly removable under the Act of Congress, approved March 3, 1875, the provisions of which we need not here repeat. The parties were before the Court; a controversy existed between them in a proceeding involving a question under the Federal Statute; and we think the order of removal should have been made."

In *Stanley v. Board of Supervisors*, 6 Fed. 561 (Circuit Court) the Court says:

"****this is a suit arising 'under the laws of the United States' within the meaning of the Act of Congress of March 3, 1875, respecting the jurisdiction of Circuit Courts. The action is to enforce a right conferred upon the plaintiff and his assignors by section 5219, of the Revised Statutes of the United States, regarding the taxation of property in the shares of national banking associations." (The nature of the suit is not further disclosed). "As was said by Chief Justice Marshall, 'A case may be truly said to arise under the constitution, or a law of the United States, whenever its correct decision depends upon a construction of either,' (*Cohen v. Virginia*, 6 Wheat. 379); or where the title or right set up by the party may be defeated by one construction of the constitution or the laws of the United States, or sustained by the opposite construction. *Osborn v. Bank of U. S.*, 9 Wheat. 822. The right of the plaintiff depends upon the construction of sec-

tion 5219. If that section is meant to interdict such an assessment as that of which the plaintiff complains, his right is sustained by a construction to such effect, and will be defeated by the opposite construction."

In *Wilkinson v. Walker,* 292 Fed. 395, the Court held it had jurisdiction of the suit because it arose under the laws of the United States, in that it was brought upon a bond given for property released by the bankrupt court to the bankrupt, the Court saying:

> "The United States Court, by reason of the Constitution of the United States and the statutes passed thereunder, had taken over the administration of this estate; therefore it had jurisdiction of the subject-matter. The property of the Walker-Grain Company was in the hands of the bankruptcy court. The court liberated the property to the bankrupt upon its giving an indemnifying or forthcoming bond. These actions, these orders, these proceedings, arose out of and by virtue of and under the laws of the United States, and hence this Court has jurisdiction to try out and determine whether a bond given out of this proceeding shall be liquidated, and, if so, in what amount and to what extent. The bond was executed and given under a "general rule," and a "special order" of a court in bankruptcy." * * *
>
> "The instant case arises directly out of those statutes of the United States which provide the methods for the conservation and distribution of the bankrupt's property."

Crane v. Bucklet, 105 Fed. 401, was a suit on a supersedeas appeal bond from District Court to Circuit Court of Appeals. The Court said:

> "The question for determination is, has this Court jurisdiction of the action? It has been held that such a controversy is one springing out of a suit already determined

in the Federal Court, and is in one sense an offshoot of that (*Seymore v. Construction Co.*, Fed. Cas No. 12,689, 7 Biss. 460); and, further, in the same case, that a supersedeas bond is an indemnity given in pursuance of a law of the United States. The measure of the liability of the party and the rights of both plaintiff and defendant depend upon a law of the United States and a rule of the Supreme Court of the United States (No. 29). 3 Sup. Ct. xiv. It is impossible to take a step in the progress of a suit brought upon such a bond in order to determine the rights of the parties without looking at the law and the rule as the guide of the court, and controlling its judgment in the determination of the case.

In the case of *Spokane Falls & N. R. Company v. Ziegler*, 167 U. S. 65, 42 L. Ed. 79, the Supreme Court of the United States took judicial knowledge that the authority of the territory to legislate in respect to the right of a territorial railroad corporation to enter upon the public lands of the United States was derived from the act of Congress and in upholding the jurisdiction of the federal court said:

> "In his complaint the plaintiff alleged that, on May 1, 1889, he was in possession, as a preemptor under the laws of the United States, of a tract of land containing about 80 acres, and on said date had made all the improvements and had lived on the land a sufficient length of time, and had done all other acts necessary to entitle him to a patent to the same from the United States; that the defendant company, being a corporation of the territory of Washington, on said date entered upon and seized a strip of said land 50 feet in width, and appropriated it for railroad purposes without the consent of the plaintiff, and without having compensated him therefor; and that the entry upon and seizure by the defendant of the land was under and pursuant to the laws of the territory of

Washington authorizing railroad companies to appropriate land for right of way for railroad tracks.

"We have judicial knowledge that the authority of the territory to legislate, in respect to the right of a territorial railroad corporation to enter upon the public lands of the United States, was derived from the act of Congress entitled 'An Act Granting to Railroads the Right of Way through the Public Lands of the United States', approved March 3, 1875 (18 Stat. at L. 482, chap. 152), whereby the right of way through the public lands of the United States was granted to any railroad company duly organized under the laws of any state or territory.

"The plaintiff's complaint therefore discloses the case of a contest between a settler claiming title under the laws of the United States and a railroad company claiming a right under an act of Congress; and of such a case the circuit court for the district of Washington clearly had jurisdiction. *Doolan v. Carr,* 125 U. S. 620 (31: 845); *Cooke v. Avery,* 147 U. S. 375 (37: 209)."

The authority of the territory to legislate in the particular matter before the court in *Spokane Falls & N. R. Company v. Ziegler,* did not arise generally and inherently from the fact that the territory existed as a political subdivision of the United States. Even though a territory with certain general powers as such, it could not have had any authority to grant to a railroad a right to enter upon public lands of the United States except by express permission from Congress. Therefore, the Supreme Court held the right invoked and involved in the suit arose under the laws of the United States.

So here, the right attempted to be vindicated and enforced, to-wit, the right to collect a tax upon the shares of the capital stock of a national bank, existed solely and alone by force of

an act of Congress, as pointed out by the Court of Appeals in the instant case.

In *Swafford v. Templeton,* 185 U. S. 485, 46 L. Ed. 1005, the jurisdiction of the circuit court (now a district court) of the United States, of an action to recover damages from state election officers for their asserted wrongful refusal to permit the plaintiff to vote for a member of the House of Representatives at a national election held in the district where he resided, was upheld as one arising under the Constitution of the United States. Mr. Justice White speaking for the Supreme Court of the United States, cited and followed the case of *Wiley v. Sinkler,* 179 U. S. 58, 45 L. Ed. 84.

We quote from the opinion of Mr. Justice White as follows:

> "It is manifest from the context of the opinion in the case just referred to that the conclusion that the cause was one arising under the Constitution of the United States was predicated on the conception that the action sought the vindication or protection of the right to vote for a member of Congress, a right, as declared in Ex parte Yarbrough, 110 U. S. 655, 28 L. ed. 275, 278. 4 Sup. Ct. Rep. 152, 158, 'fundamentally based upon the Constitution (of the United States), which created the office of member of Congress, and declared it should be elective, and pointed to the means of ascertaining who should be electors.' That is to say, the ruling was that the case was equally one arising under the Constitution or laws of the United States, whether the illegal act complained of arose from a charged violation of some specific provision of the Constitution or laws of the United States, or from the violation of a state law which affected the exercise of the right to vote for a member of Congress, since the Constitution of the United States had adopted, as the qualifications of electors for members of Congress, those pre-

scribed by the state for electors of the most numerous branch of the legislature of the state.

"It results from what has just been said that the court erred in dismissing the action for want of jurisdiction, since the right which it was claimed had been unlawfully invaded was one in the very nature of things arising under the Constitution and laws of the United States, and that this inhered in the very substance of the claim. It is obvious from an inspection of the certificate that the court, in dismissing for want of jurisdiction, was controlled by what it deemed to be the want of merit in the averments which were made in the complaint as to the violation of the Federal right. But as the very nature of the controversy was Federal, and, therefore, jurisdiction existed, whilst the opinion of the court as to the want of merit in the cause of action might have furnished ground for dismissing for that reason, it afforded no sufficient ground for deciding that the action was not one arising under the Constitution and laws of the United States."

In *McGoon v. Northern Pacific Railroad Company*, 204 Fed. 998, a case referred to manifestly with approval, by the Supreme Court in the recent case of *Puerto Rico v. Russell & Company*, 288 U. S. 476, 77 L. Ed. 903, is an excellent review of the authorities on the subject of when a case arises under the laws of the United States so as to give the courts of the United States jurisdiction thereof. The learned Judge in that case, we submit, very aptly said:

"But when the complainant asserts a right created by federal law, it presents a suit which *may properly* turn upon a construction of that law; and such a suit 'arises out of' the law for purposes of federal jurisdiction, notwithstanding the defendent may raise only issues of fact by his answer."

CASES RELIED UPON BY PETITIONER DIFFERENTIATED

The case of *Puerto Rico v. Russell & Company*, 228 U. S. 476, 77 L. Ed. 903, is not in conflict with the decision of the Circuit Court of Appeals. This case is reported, in the lower court, in 60 Fed. (2) 10. In that case the removal was upheld on the theory of diversity of citizenship, as to which the Supreme Court disagreed with the lower court.

The case of *Puerto v. Russell & Company*, supra, did not involve the taxation of shares of stock in a national bank.

The fact that the People of Puerto Rico is a political entity, recognized as such by an act of Congress under which its government is organized, was not deemed sufficient to make a suit brought by it to recover an improvement tax, such as that involved in the case of *Puerto Rico v. Russell & Company*, supra, one arising under the laws of the United States any more than a like suit brought by a state which came into the Union by virtue of an act of Congress. The right to levy the improvement tax was not granted by an act of Congress.

Here, the right to tax at all is specifically created by an act of Congress.

As aptly said by Judge Sibley, in the opinion in this case:

"Section 548 is not a limitation placed by the federal laws upon an antecedent right of the state to tax national banks, so as to be considered only a weapon of defense against such taxation. Both in form and in substance it is a grant of authority to state legislatures to tax such banks, limiting them, however, to one of three forms of taxation" mentioned in the statute.

This case does not involve merely a right to sue, derived from Federal law, as in the case of *Puerto Rico v. Russell & Co.*, supra, nor merely the right to property which was obtained under Federal Statute.

In the instant case, the foundation of the right to tax national bank stock at all, to any one, in any manner, and the right to collect a tax of a receiver of an insolvent national bank and the assets in his hands, is necessarily grounded upon the Acts of Congress, and the controlling question is the interpretation and enforcement of the Federal Statutes in that regard. Such appears upon the face of the petitioner's pleadings.

Nor is there any conflict between the decision of the Circuit Court of Appeals of the Fifth Circuit in the instant case and the opinion of the Supreme Court of the United States in *Shulthis v. McDougal,* 225 U. S. 561, 56 L. Ed. 1205.

In *Shulthis v. McDougal* no question as to the validity of, and enforceability of, a tax against a national bank as against the assets of an insolvent national bank in the hads of a receiver as here, was involved. In *Shulthis v. McDougal* there was merely a controversy over rights and titles in and to lands originally allotted to the Creek Nation under Acts of Congress. In other words, under various statutes of the United States, certain lands had been alloted in severalty to the Creek Nation and provision had been made as to their leasing and alienation after allotment. True, as pointed out by the Court, there was enough in the bill of complaint to indicate that those statutes constituted the source of the complainant's title or right originally to the land involved, and that the defendants were claiming the land, or certain rights thereunder adversely to the complainant. But under the allegations of the bill, it did not appear as here, that the complainant necessarily relied upon the laws of the United States. Not only was there no mention made of certain statutes relating to the allotments to the Creek Nation and the laws as to the alienation of such lands, but there was nothing to show that any controversy respecting their validity, construction or effect was involved and as pointed out by the Court, such did not appear "by necessary implication." The Supreme Court of the United States, also pointed out that nature of the

controversy between the complainant and his opponent was unstated and uncertain and could have arisen in different ways "wholly independent from the source from which his title or right was derived." In addition thereto, the Court expressly held that the corporation there being sued was not a Federal but a state corporation.

Here, it clearly appears upon the face of the petitioner's own pleadings that in order to hold respondent under its contract with the receiver of the old bank, it was necessary for petitioner to show that the tax claimed was laid in conformity to, and valid under, the laws of the United States and that the claimed liability of the old bank therefor was one that was enforceable against the receiver of the old bank and the assets in its hands after insolvency. The determination of such questions necessarily involved the construction, effect and applicability of the laws of the United States as applied to the facts. Indeed, the case could not be decided by any court without construing and applying the Federal statutes.

The case of *Shoshone Mining Company v. Rutter,* 177 U. S. 505, 44 L. ed. 865, is clearly distinguishable from the case at bar. That suit merely involved an issue as to the right to possession of property, the title to which had been derived from the United States. It was a mining claim. It is true that authority to bring an action to determine the right of possession had been conferred by an act of Congress, but that act authorized the action to be brought in any court of competent jurisdiction. It did not create the right to possession and furthermore, the statute there construed expressly provided that the right of possession might be determined by "local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States" or "by the statute of limitations for mining claims of the state or territory where the same may be situated." It was held by the Supreme Court that a suit with reference to

possession of such lands may not involve any question under the Constitution or the laws of the United States but simply a determination of local rules or customs or state statutes or even only a mere matter of fact. Mr. Justice Brewer very aptly drew a distinction between a statute authorizing an action to establish a right and one which created the right to be established, saying:

> "A statute authorizing an action to establish a right is very different from one which creates a right to be established. An action brought under the one may involve no controversy as to the scope and effect of the statute, while in the other case, it necessarily involves such a controversy, for the thing to be decided is the extent of the right given by the statute."

This case of *Shoshone v. Rutter,* supra, is very aptly distinguished from cases of the type of the one at bar, in the opinion of the court in *McGoon v. Northern Pacific Railroad Company,* 204 Fed. 998, cited supra, from which we quote as follows:

> "*Shoshone Mining Co. v. Rutter,* 177 U. S. 505, 20 Sup. Ct. 726, 44 L. Ed 864, is a leading authority on this subject. It was an adverse suit to determine the right of possession to a mining claim. The suit was authorized by section 2326 of the Revised Statutes (U. S. Comp. St. 1901, p. 1430), but the right which it was to determine was not created by federal law. On the contrary, that right was dependent upon state statutes, and the local customs and rules of miners in the several mining districts. Because the right was not created by federal law, it was held that the case was not a suit arising under a law of the United States. The case, as Mr. Justice Brewer says, is a close one. In pointing out the distinction which determined the decision, the learned justice uses the following

accurate language (177 U. S. at page 510, 20 Sup. Ct. at page 728, 44 L. Ed. 864):

"'A statute authorizing an action to establish a right is very different from one which creates a right to be established. An action brought under the one may involve no controversy as to the scope and effect of the statute, while in the other case it necessarily involves such a controversy, for the thing to be decided is the extent of the right given by the statute.'

"The whole reasoning of the opinion shows clearly that, if the right of possession which the suit was brought to determine had been created by federal law, the case would then have been a suit arising under a law of the United States."

The case of *American Well Works Company v. Layne & Bowler Company et al.*, 241 U. S. 257, 60 L. ed. 987, does not militate against our contention here. That was a suit for damages for libel and slander by statements to various persons that the plaintiff was infringing a patent to the defendant and that the defendant would sue both the seller and the buyer if the plaintiff's pumps were used. The majority of the Supreme Court held that the case arose under the law of the state. Justice McKenna dissented. However, in that case, the court held that it was immaterial whether or not the plaintiff's business which he claimed had been damaged, was built up by patents or without and that it was no part of plaintiff's case to prove anything concerning defendant's patents or that the plaintiff did or did not infringe the same, and still less to prove anything concerning patents of his own. A suit for damages to business caused by a threat to sue under the patent law was held not to be itself a suit under the patent law. The decision recognized the principle that a suit arises under the law that creates the cause of action.

So here, the law that gave the right sought to be vindicated in the instant case, was a law of the United States, and as a condition precedent to the enforcement of the right, petitioner necessarily invoked the law of the United States out of which the right arose and by his suit, necessarily was required to establish that the claimed right existed under that law. Whether he referred to it or not eo nomine, he set forth a state of facts pertaining to the assessment and thereon asserted the existence of his right, contending that those facts showed a valid tax which could not be true unless the facts showed compliance with the law of the United States. The petitioner's right could neither be vindicated, nor enforced without reference to the law of the United States that created it.

It would hardly seem necessary to refer to counsel's reference to the dissenting opinion in *Smith v. Kansas City Title & Trust Company*, 225 U. S. 180, 65 L. ed. 577. The majority opinion sustains respondent's contention. Justice Holmes' dissent recognizes the principle that the suit arises under law that created the cause of action.

Here, the state law derives its force from the authority of the law of the United States and any procedure whatever with reference to the enforcement of the taxes must conform primarily to the law of the United States.

The case of *Minnesota v. Northern Securities Company et al.*, 194 U. S. 48, 48 L. ed. 870, was an effort by the state of Minnesota to enforce its own statutes against trusts and combines. We submit nothing therein militates against the contention of the respondent here.

The case of *Great Northern Railway v. Alexander*, 246 U. S., 276, 62 L. Ed. 713, is not an authority against respondent here. That case merely held that a suit under the Federal Employers Liability Act which was begun in the State Court by the plaintiff and did not become removable in the absence of

any claim that there was a false attempt to evade the removal merely because in developing the case the plaintiff may have failed to prove the allegation in his declaration that the deceased and the railroad were both employed in interstate commerce at the time of injury.

The case of *Carson v. Dunham*, 121 U. S. 421, 30 L. Ed. 992, is no authority against the position of the respondent here. That was merely a case where the plaintiff sought to foreclose a mortgage assigned to him by certain parties. Mrs. Carson was made a party on the theory that she was in possession of the mortgaged property and that she and plaintiff were the only necessary parties to the suit. Mrs. Carson removed the case into the United States Court, and in her petition for removal sought to raise the Federal question. There was nothing in the plaintiff's pleadings that showed a case arising under any law of the United States. That contention was offered defensively. Furthermore, the defendant in seeking to raise the Federal question merely planted herself upon the position that the property of which she was in possession had been previously adjudged to her by the Circuit Court of the United States for the District of South Carolina. In other words, she merely claimed, on that feature of the case, that the District Court of the United States had established her title to the property. That contention was held not to be sufficient to show that the cause arose under the laws of the United States. The case of *Providence Savings Co. v. Ford*, 114 U. S. 635, referred to in the decision by the Supreme Court of the United States, held that a suit on a judgment rendered in favor of a party in a Federal Coourt is but the assertion of an ordinary right, unless some question is raised distinctly involving the laws of the United States.

In the instant case, however, as we have hereinabove pointed out, the facts pleaded by the petitioner affirmatively and clearly show that the controversy distinctly involves the laws of the

United States, and that the petitioner necessarily must and does rely thereon.

The case of *Fourth National Bank v. City of Boston,* 300 Fed. 29, is not applicable here, nor is it sound authority against respondent's position. That was a suit by a National Bank against the City of Boston, in which the Court held that the bill was not good as one giving jurisdiction to the Federal Court where the bank, suing to recover taxes, only alleged that the authorities of the defendant City, "purporting to act under a state statute, assessed a tax on such shares at a greater rate than was assessed on moneyed capital in the hands of individual citizens of that state, that the tax was assessed and collected without warrant of law and contrary to the provisions of the statutes and laws of the United States was too uncertain and ambiguous and did not clearly present a Federal question." Manifestly, the decision is not controlling here, for the reason that it has been repeatedly held since then and by the Supreme Court of the United States, that the Courts of the United States do have jurisdiction of bills filed by national banks on behalf of the shareholders to recover taxes paid on the ground that the state taxing laws discriminated against the shares of national banks, and in favor of other moneyed capital employed in competition therewith. See the following:

Calloway v. Bohler (D.C. Ga) 291 Fed. 245, approved 297 U. S. 479., 69 L. Ed 745.

Charleston National Bank v. Mellon, 171 Fed. 743.

There is nothing in the case of *Neely v. Planters National Bank of Clarksdale,* 48 Fed. (2) 266, that militates against the position of the respondent here. There was no suit in that case involving any points or contentions such as are presented in the one at bar. The same District Judge, Hon. E. R. Holmes, decided this case that decided, in a very able opinion, the case of *Hattiesburg v. First National Bank of Hattiesburg,* 8 Fed.

Supp. 157, which we have cited at another place in our brief. A mere casual inspection of the case will indicate that it has no application here. Neely brought his suit against the bank, before the appointment of a receiver, about a matter of purely private contract between him and the bank in no way involving any law of the United States. The Court merely held that the fact the National Banking Association had been sued in the State Court did not give ground for removal to the United States Courts.

Nor is this case like unto the case of *Moulton v. National Farmers Bank,* 27 Fed (2), 403.

The case of *In Re Winn,* 213 U. S. 458, 58 L. ed. 873, is distinguishable from the case at bar in that the cause of action there brought was not, as said by the Supreme Court, "based upon the interstate commerce law or upon any other law of the United States."

In that case, it appeared:

> "The petitioner as assignee of the right of action of a shipper, brought, in a state court of Iowa, an action at law against the American Express Company for the negligent transportation of a boar, whereby the animal was killed, to the damage, it was alleged, to the owner of $8,000. The transportation was under a written contract between the owner and the defendant, which was annexed to the declaration as an exhibit. The shipment was from a point in Iowa to a point in Nebraska."

The Court followed the case of *Louisville & Nashville Railroad Company v. Mottley,* 211 U. S. 149, 53 L. ed. 126. *Louisville & Nashville Railroad Company v. Mottley* was a suit begun in a state court to compel the specific performance by a carrier of its agreement to issue free passes annually to the complainants. The suit was predicated on the contract. It was not based upon a law of the United States. The court held that the case was

not made removable because the plaintiff anticipated in his pleadings the defense that the carrier would make to the suit by alleging unnecessarily that the defendant was basing its refusal to comply with its contract upon an act of Congress. The Supreme Court of the United States held in line with the generally accepted rule, that a suit arises under the Constitution and laws of the United States within the removal statutes only when the plaintiff's statement of his own cause of action shows that it is based upon those laws or that constitution.

It is clear from the decisions of the cases of *In Re Winn* and *Louisville & Nashville Railroad Company v. Mottley,* supra. that had the suits been based upon a right granted by an act of Congress upon which the plaintiffs must necessarily rely, the suits would have arisen under the laws of the United States.

Nor is the case of *Guthrie v. Harkness,* 199 U. S. 48, 50 L. ed. 130, applicable here. In that case, the suit was clearly one to enforce the common law right of a stockholder for proper purposes and under reasonable regulations as to place and time, to inspect the books of a corporation of which he is a member. This common law right had not been granted by an act of Congress, nor had any law of Congress restricted its exercise.

The case of *Schuyler National Bank v. Bollong,* 150 U. S. 85. 37 L. ed. 1008, does not deal with any question of removal, nor with the proposition as to when a cause arises under the laws of the United States. The case was tried out in the state court of Nebraska and affirmed by the state supreme court and reached the Supreme Court of the United States by writ of error.

The Supreme Court of the United States in dismissing the writ of error said:

> "The questions raised upon the pleadings, were disposed of by the supreme court in accordance with these provisions and the jurisprudence of the state in that re-

gard, and there is nothing whatever to indicate that in passing upon the technical sufficiency of the complaint its attention was invited to the proposition that by its judgment thereon it might be depriving the defendant below of some title, right, privilege, or immunity arising in virtue of the sections under which the liability accrued."

The petitioner has cited decisions announcing the rule that, for a suit to be removable to a Federal Court upon the ground that it is one arising under the Constitution and laws of the United States, it must so appear from the plaintiff's statement of the case in his pleadings, and not from any defense interposed by the defendant. But none of these cases controvert the rule laid down in the case of *City of Hattiesburg v. First National Bank,* 8 Fed. Supp. 157, and other cases cited by us, that the question as to whether a suit is one arising under the Constitution and laws of the United States does not always depend upon whether or not the plaintiff has specifically cited and relied upon a law of the United States in the statement of his cause; but, rather, upon whether or not the plaintiff must rely upon a law of the United States.

None of the cases cited by petitioner controvert the proposition that the very nature of the case may determine whether or not it arises under the Constitution and laws of the United States, notwithstanding the petitioner has failed to expressly refer to them.

For instance, the leading case of *State of Tennessee v. Union & Planters Bank,* 152 U. S., 453, cited and quoted at length by the petitioner, does hold that for a case to be removable as a suit arising under the Constitution and laws of the United States, it must so appear in the plaintiff's statement of his claim; but the language of the opinion does not justify the conclusion that the plaintiff must have expressly declared upon a law of the United States in order to make the case removable.

For instance, the Court says (p. 419) quoting Chief Justice Marshall:

> " . . . and when a question to which the judicial power of the Union is extended by the Constitution forms an *ingredient of the original cause* it is in the power of Congress to give the Circuit Court jurisdiction of that cause, although other questions of fact or of law may be involved in it. . . "

The Court Says further:

> "The question which the case involves, then" (meaning at that time) "must determine its character, whether those questions be made in the cause or not."

And, further, (page 460):

> "The question whether a party claims a right under the Constitution or laws of the United States is to be ascertained by the legal construction of its own allegations."

We submit that, as held in the cases cited by us, Section 5219 of Revised Statutes, was of necessity an ingredient of the petitioner's case, and that the very character of the suit brought by petitioner made it a suit arising under the laws of the United States.

In *Tennessee v. Union & Planters Bank*, supra, the Court was emphasizing the rule that it was not sufficient that the Federal question upon which the cause depends was first presented by the answer or plea of the defendant.

The Federal question in that case was presented by the answer of the defendant that defendant banks were exempt from taxation upon their shares of capital stock, by virtue of their charters, and that the general revenue or taxing law of the State of Tennessee, under which the assessments were made, was in violation of that clause of the Constitution of the United States, which forbids a State to pass any law impairing the obligation of a contract.

PETITIONER ESTOPPED BY AMENDMENT AFTER MOTION TO REMAND OVERRULED

Petitioner is estopped to contend that he did not rely upon the laws of the United States for the reason that after the District Court of the United States had overruled the motion to remand and had heard the motion to dismiss and announced orally his conclusion that the motion to dismiss the bill should be sustained, petitioner presented a motion for leave to amend the seventh, eighth, twenty-first and forty-third paragraphs of the original bill so as to aver that the liability of the shareholders of the old bank to taxation in the instant case was pursuant to the laws of the State of Mississippi "and the laws of the United States," and that the old bank was required to make the returns that it is alleged it did make by the "laws of the State of Mississippi and of the United States" (Transcript, p. 78).

The motion to amend contains other matter, but at this point, we direct particular attention to that feature of it which expressly invokes the laws of the United States to establish the validity of the assessment and tax. Numerous objections to the allowance of this amendment were filed by the respondent, the new bank, which will be found, beginning at the bottom of page 80 of the Transcript. We refer at this point, however, to only one of those grounds of objections to the allowance of the amendment, which will be found, Transcript, page 82, and reads as follows:

> "7. It would be futile to grant the plaintiff's motion to allow the proposed amendments to the bill of complaint, because of the fact that if the said amendments to the bill be made, still the bill as amended would state no cause of action against this defendant, and would still be subject to the same objections as were made to the original bill in this defendant's motion to dismiss the same."

It will be noted from the final decree in the lower court, (Transcript, p. 84), that the District Court was of the opinion that the quoted ground of objection to the amendment was good, and in passing thereon, ordered the proposed amendment and the objections thereto made a part of the record and found and declared with reference thereto as follows:

> "* * * that the proposed amendments, if allowed, neither change in any material way the legal effect of the original bill, nor cure the defects therein; that considering the bill as amended by the proposed amendments, the Court is of the opinion, that the assessments relied on are not the equivalent of a tax on the shareholders, are wholly void, contrary to the laws of the United States and of the State of Mississippi, beyond the power of such taxing authorities and unenforceable."

It appears, therefore, that the court in passing on the motion to dismiss, treated the bill as amended by the proposed amendments and held the alleged tax here sued for, to be based upon an assessment that was wholly void and contrary to the laws of the United States and of the State of Mississippi.

See the case of *Henderson v. Maryland Casualty Company*, (Fifth Circuit), 62 Fed. (2) 107. In that case the plaintiff being entitled to a weekly wage of $16.95 which in the aggregate for the total weeks sued for, amounted to $3661.20, averred in his petition, wishing to avoid removal to the Federal court, a weekly wage of only $13.50, and on the face of his pleading sought to recover only $2916.00. The defendant on the petition averring the true wage and that more than $3000.00 was involved, removed the case to the District Court of the United States. The plaintiff there asked that it be remanded to the state court. But when the motion to remand was overruled, plaintiff then amended in the District Court and sought recovery for the true wage and a total of $3661.20. Speaking to the point, Judge Sibley for the court, said:

"This amendment we think waived and cured any error that may have been made in refusing the remand. The controversy really was one within the jurisdiction of the District Court, and the pleadings thereafter showed it. The plaintiffs thenceforward were invoking the court's jurisdiction to recover $3661.20. While asserting this claim, they could no longer maintain the inconsistent position that only $2,916 was involved. They are estopped to do so. Compare *New Lamp Chimney Co. v. Brass & Copper Co.*, 91 U. S. at page 659, 23 L. Ed. 336; *Davis v. Wakelee*, 156 U. S. 681, 15 S. Ct. 555, 39 L. Ed. 578."

We contend that the bill as originally drawn from the facts therein averred affirmatively and clearly showed reliance upon the laws of the United States; and that not only is this true, but that by the proposed amendment which the District Court treated as having been made, in sustaining the motion to dismiss, the petitioner admitted and conceded of record that he was relying upon the laws of the United States.

OTHER LAWS OF THE UNITED STATES RELIED ON BY PETITIONER AND ANSWER TO PETITIONER'S POINT 2

It is further apparent from the pleadings of the petitioner that affirmative reliance was necessarily based not only on Section 5219 of the Revised Statutes, 12 USCA, Section 548, to establish the validity of the claimed tax, but upon the laws of the United States with reference to the winding up of insolvent banks and distribution of the assets of an insolvent bank pursuant to the authority and consent of the Comptroller of the Currency and under laws of the United States. See, 12 USCA, Sections 191, 192, 193, 196, 197 and 198.

Though the Circuit Court of Appeals stated in the opinion that it did not conceive that the suit was one for the winding up of, and the liquidation of, the affairs of an insolvent national

bank, this was said after the court had reached the conclusion that jurisdiction was amply sustained on the ground that the suit was one arising under the laws of the United States. We respectfully submit that the jurisdiction of the District Court of the United States was rightly upheld by the Court of Appeals on the ground that the suit was one necessarily arising under the laws of the United States; but, further that if it were necessary to do so, jurisdiction can be upheld on the ground that the suit is one, the manifest purpose of which on the face of the petitioner's own pleadings, is further winding up of, and liquidation of, the affairs of an insolvent national bank within the meaning of Paragraph 16 of Section 41 of the Judicial Code.

The most recent decision on the jurisdiction of the courts of the United States of cases for winding up the affairs of a national banking association is that of *Lawrence National Bank v. Rice et al.*, decided by the Court of Appeals for the Tenth Circuit. It is twice reported. On the merits the case is reported in 82 Fed. (2) 28. On application for rehearing, the court considered the jurisdictional question and upheld the jurisdiction of the United States District Court, *Lawrence National Bank v. Rice et al.*, 83 Fed. (2) 642. The suit was by a liquidating committee of a national bank which had voluntarily dissolved to determine whether or not the bank had barred its creditors by voluntary dissolution and to construe the contract whereby liabilities were assumed by another bank. In holding the suit was one for winding up the affairs of a national bank, the court said:

> "We are also warned that if jurisdiction be here sustained, a liquidating bank or its committee may sue on every ten dollar note of the bank, as can a receiver of a bank which is in process of involuntary liquidation. The conclusion does not follow. This suit is brought to determine whether the Watkins Bank had barred its creditors by voluntary dissolution and the publication of notices in accord

with federal statutes, and to construe the contract by which its liabilities were assumed by the Lawrence Bank. The case is bottomed upon a right given by a federal statute and to construe the contract by which its affairs were wound up. That contract is the very heart of the winding up of the affairs of the Watkins Bank. A case involving its construction is one therefore 'for winding up the affairs' of a national bank. But if the conclusion does follow, upon which we express no opinion, and if a bank in voluntary liquidation should be placed on a different footing from one in involuntary liquidation, as appellees urge, it is a matter for Congress and not the courts. We conclude the jurisdiction exists."

See, *Citizens National Bank in Waxahachie v. Citizens National Bank of Waxahachie et al.*, 9 Fed. Supp. 513.

The action here involved is, in legal effect, of the same nature as a suit to establish a claim against the receiver of the insolvent First National Bank *of* Meridian, and is against an agent designated by the receiver and the shareholders of the old bank to complete its liquidation, whereunder it is claimed the specific alleged debt was provided for though not in express terms.

As stated by the Court in *Guaranty Company v. Hanway*, 104 Fed. 369, 44 C. C. A. 312:

"An action by or against a receiver of a national bank, appointed under this Act, is an action arising under the laws of the United States, because the Act of Congress creates his office, grants his rights and powers, and imposes his duties. In the absence of this act there would be no such receiver, and no suits against him could arise. Every action by or against him necessarily involves the exercise of some of his rights, or the proper discharge of some of his duties, and invokes a consideration of the

proper construction and effect of the laws of the United States from which he derives them. For these reasons, in contemplation of law every action by or against him arises under the laws of the United States. *McDonald v. Nebraska* (C. A. A.), 101, Fed 171, 172; *Auten v. Bank*, 174 U. S. 125, 19 Sup. Ct. 628, 43 L. Ed. 920; *In re Chetwood*, 165 U. S. 458, 459, 17 Sup. Ct. 385, 41 L. Ed. 782; *Armstrong v. Trautman* (C. C.) 36 Fed. 275; *Grant v. Bank* (C. C.) 47 Fed. 673.

"The same reasons bring actions by or against a shareholder's agent under the same rule."

The court said further:

"This is clearly a case for winding up the affairs of such a bank. It is a suit to take $4,000.00 from the fund realized from the collection and sale of the assets of the National Bank of North Dakota in the process of winding up its affairs under the Act of Congress, and to pay it to the plaintiff instead of permitting it to be distributed to the shareholders.

" * * * it is the nature of the action, and not the possibility of maintaining it that determines whether or not a case arises under the laws of the United States. If the case presents a question, or may present a question, to be determined by those laws and the acts of the parties under them, it arises under the laws of the United States, which ever way the question ought to be determined * * * *

"Upon the questions presented by this claim, he was entitled to a hearing and a decision, and that decision could not be reached without a consideration of the provisions of the Act of Congress under which the defendant was appointed, and the effect of his acts thereunder. The case, therefore, arose under the laws of the United States, even

if a proper decision of that question would have defeated the plaintiff."

The case of *International Trust Co. v. Weeks,* 203 U. S. 364, 51 L. Ed. 224, was an action on a contract brought in the Circuit Court of the United States for rent alleged to be due under the terms of the lease made by Henry Parkman et al. to Broadway National Bank. The defendant was agent of the shareholders of Broadway National Bank. The Court said, among other things:

> "1. It is objected by the defendant in error that the Circuit Court had no jurisdiction of this case. We think otherwise. The action was clearly one to wind up the affairs of the bank"—citing *In re Chetwood,* 165 U. S. 443, and *Guarantee Company v. Hanway,* 104 Fed. 369, 44 C. C. A. 312.

In the case at bar, the respondent, First National Bank *in* Meridian is manifestly sued on the theory that it stands in the place of the receiver of the insolvent First National Bank *of* Meridian, under and by virtue of the contract filed as an exhibit to the bill.

It will be noted that in those cases against the receiver of an insolvent national bank, or against the agent of the shareholders, it was not considered material, in determining that the case was one arising under the laws of the United States, for the plaintiff to make specific reference to the particular statute under which the receiver was acting; but the mere fact that the suit was against a receiver of an insolvent National Bank, or against the agent of the shareholders of an insolvent national bank, or to recover a tax assessed against a national bank, was sufficient to characterize it as a suit arising under the laws of the United States.

It is sufficient that the plaintiff shall have averred facts which bring the case within the control of the Federal statute.

Bell v. Kelly, 54 Fed. (2d) 395.

This was a suit in which plaintiff sought to establish a prior claim as to certain of the assets of an insolvent bank which had passed to a third party and which the plaintiff claimed had been wrongfully transferred to a third party. The suit was brought against the receiver and the third party. On the question of jurisdiction the Court said:

> "The determination of the controverted questions involved and relate to the conduct of the insolvent bank's business, the disposition of certain of its assets and the respective priorities of the receiver, the plaintiff and other persons claiming interest in or title to certain of the assets. Such a suit must be held to be within the category of suits for winding up the affairs of an insolvent banking association."

The Court sustained its jurisdiction of the case as being a suit for winding up the affairs of a national banking association.

Chabot v. McRae, 7 Fed. Supp. 113.

This was a suit in which three trustees of an insolvent national bank were substituted as plaintiff to recover upon assets which had been transferred by the board of directors to the trustees, in pursuance of the plan provided by the Comptroller of the Currency, under authority of Section 207, Title 12, U. S. C. A., to be liquidated for the benefit of unsecured creditors of the bank. On the question of jurisdiction, the Court said:

> "Even if it be assumed that such trustees are not officers of the United States—(as in cases of similar but not entirely analogous character receivers and agents have been frequently held to be)—citing authorities, there can be no

escape from the conclusion that it is a case of winding up the affairs of a national banking association, within the meaning of subdivision 16 of Section 41, Title 28, U. S. C. A."

The jurisdiction of the case was upheld as a case for winding up the affairs of a national bank.

Another Federal question arising under the laws of the United States presented by the bill is this:

The bill alleges (Transcript, pp. 10-11) Paragraphs 39-41, that the defendant bank assumed and undertook to discharge all liabilities of every kind *imposed by statute* upon the shareholders of the insolvent First National Bank *of* Meridian by reason of their ownership of said shares, among which liabilities was and is the liability to pay all taxes as set out in the bill.

Since the liability of a shareholder, as alleged in the bill, is imposed by statute—that is to say, by the statutes of the United States, particularly Sections 5151 and 5234, Revised Statutes (Sections 63, 64 and 192, Title 12, U. S. C. A.), the question as to whether or not the shareholders' liability extends to the payment of the taxes in question is to be determined by the application and construction of the statutes of the United States.

The personal liability of a stockholder in a national banking association is statutory,—*Kennedy v. Gibson,* 75 U. S. 498. 19 L. Ed. 347—and cannot be controlled or limited by state statutes. *Rankin v. Barton,* 199 U. S. 228, 50 L. Ed. 163.

CONCLUSION

We respectfully submit that the following propositions are clearly deducible from the authorities cited, and are sound:

1. That in order to sustain the jurisdiction of the United States District Court, on the ground that the suit is one arising under the Constitution and Laws of the United States, such must affirmatively appear from the pleadings of the petitioner.

2. The pleadings of the petitioner need not necessarily expressly refer either to the Constitution or the laws of the United States. It sufficiently and affirmatively appears on the petitioner's pleadings that the suit arises under the Constitution and laws of the United States, whenever, on a proper analysis of those pleadings, it is apparent that the constitution or laws of the United States are a necessary ingredient of petitioner's cause of action, and inhere in it; or that the suit is for the vindication, protection or enforcement of a right, fundamentally based on the Constitution or laws of the United States,—a right granted or created thereby.

3. That there is a clear distinction between those cases where the Act of Congress merely gives a right to sue, but does not grant or create the right, of which:

Puerto Rico v. Russell & Co., 288 U. S. 476, 77 L. Ed. 903, and

Shoshone Mining Co. v. Rutter, 177 U. S. 505, 44 L. Ed 865 are types; and those cases where the Act of Congress creates or grants the right which the plaintiffs assert and seek to vindicate and enforce, of which this case, and:

City of Hattiesburg v. First National Bank of Hattiesburg, 8 Fed. Supp., 157;

Swafford v. Templeton, 185 U. S. 485, 46 L. Ed, 1005;

Wiley v. Sinkler, 179 U. S. 58, 45 L. Ed. 84; and

Domenech v. National City Bank, 294 U. S. 199, 79 L. Ed 857 are types.

In presenting and arguing this case, petitioner has, as we submit in all deference, failed to note the line of demarcation between the two classes of cases.

4. That the case at bar is clearly one in which, on the face of petitioner's own pleading, when properly analyzed and understood, the right asserted and sought to be vindicated and enforced, is one granted and created by the laws of Congress, which are a necessary ingredient of the petitioner's case, and, without reliance on which, the suit could not possibly be maintained.

5. That not only is this true, but that petitioner, after the motion to remand was overruled, presented amendments to the original bill of complaint, expressly invoking the laws of Congress. which amendments, though denied, were treated by the District Court as made, in passing on the motion of respondent to dismiss the original bill; and that thereby petitioner estopped himself to contend that his pleadings did not, on their face, invoke the laws of the United States as an essential ingredient in the asserted right to recover:

Henderson v. Maryland Casualty Co., 62 Fed (2) 107

6. That it appears on the face of petitioner's pleadings that the suit is one for the winding up of an insolvent national bank under Paragraph 16, Section 41, Title 28, U. S. C. A.:

Citizens National Bank in Waxahachie v. Citizens National of Waxahachie, 9 Fed. Supp. 513;

Lawrence Nat'l Bank v. Rice, 83 Fed (2) (10th Ct) 642.

7. That the suit is in effect one against an agent designated by the Receiver and shareholders of the old bank to complete its liquidation.

International Trust Company v. Weeks, 203 U. S. 364, 51 L. Ed 224

8. That this case is pervaded from its origin to its close by United States law and United States authority; and that, in affirming the decision of the lower Court, the Court of Appeals of the Fifth Circuit, rightly construed petitioner's pleadings in accordance with those laws, and determined against the petitioner's claim that it could not be maintained:

(a) Because the assessments of the taxes were void as contravening section 5219 Revised Statutes of the United States, Title 12, U. S. C. A., Section 548:

First National Bank of Gulfport v. Adam, 258 U. S. 363, 66 L. Ed. 661.

(b) That after the insolvency of the old bank, its Receiver (and, necessarily, the purchaser of the assets from the Receiver) could not be required to pay the tax here sought to be enforced:

Stapylton v. Thaggard, 91 Fed. 93

City of Boston v. Beal, 51 Fed. 306, affirmed 55 Fed. 26

Brown v. French, 80 Fed. 166

We respectfully insist that the jurisdiction of the District Court of the United States for the Eastern Division of the Southern District of Mississippi, is clear; and that the case should be affirmed.

Respectfully submitted,

A. S. BOZEMAN and

R. E. WILBOURN

Attorneys for Respondent

I, the undersigned, R. E. Wilbourn, hereby certify that I have this day delivered to Hon. J. C. Floyd, Attorney for Petitioner, at his office at Meridian, Mississippi, a true and correct copy of the foregoing brief on behalf of respondent.

This the.....day of October, A. D., 1936.

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Of Counsel for Respondent